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IN THE

Supreme Court of the United States

No. 77-1301

GANNETT COMPANY, INC.,
Petitioner,

v.

THE HON. DANIEL A. DE PASQUALE, *et al.*,
Respondents.

Brief Amici Curiae of

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

THE NATIONAL ASSOCIATION OF BROADCASTERS

In Support of Petitioner

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In Support of Petitioner

INTRODUCTION

This case poses a critical question: do the First and Sixth Amendments to the United States Constitution permit trial judges to seal off from the public and the press post-indictment proceedings prior to the opening of the trial – without any notice or effective hearing and without presenting any specific showing of a clear and present danger to the administration of justice. Amici believe that no more important ques-

tion has been presented to this Court concerning public accountability of the judiciary since *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

The rule enunciated by the New York Court of Appeals limiting press and public access to pretrial proceedings, if not reversed, would have a significant public impact, because approximately ninety percent of all criminal indictments in this country are settled prior to the formal opening of the trial. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime 134 (1967). Thus, the rule would in effect give trial judges the broad discretionary power to seal off, virtually at will, their activities in nine out of every ten criminal cases which pass through the state court systems.

Moreover, it is not only judges' conduct which would be hidden from public scrutiny. Many pretrial proceedings raise critical legal issues as to whether constitutional standards have been respected by the prosecution and the police – for example, in obtaining confessions, in issuing search warrants for the seizure of evidence, in making arrests and issuing arrest warrants, in using informers, in placing wiretaps, and in conducting plea bargaining.

Because there is no trial in ninety percent of the criminal cases, the pretrial proceeding may be the only forum for public information about official conduct. Giving politically-appointed or elected trial judges the broad discretionary power to seal these proceedings would in many cases insulate the judiciary, the prosecution and the police from any meaningful public accountability. It would encourage the type of political corruption prevalent in the state judiciaries prior to the great reform movement led by the late Chief Justice Vanderbilt of New Jersey. It would exacerbate partisan political pressure on the judicial branch – the branch that has always been the most open, and therefore the most trusted, branch of our government.

As a result, the judiciary would become more vulnerable to money, ambition, votes and all the considerations so alien to the fair administration of justice.

Amici submit that the history, philosophy and common practices of the American courts before, and immediately after the drafting of the Sixth Amendment establish that the Framers of the Constitution, in drafting the Sixth Amendment, adopted the established principle that the public and the press have a vested right to attend *all* post-indictment stages of criminal proceedings.

Based on the history and development of the Sixth Amendment and on the significant and adverse impact of a pretrial secrecy rule, Amici contend that the public and the press have a vested constitutional right to attend all stages of post-indictment proceedings; and, furthermore, that such a right can only be limited if (a) there is convincing evidence that attendance by the public and the press will "pose a serious and imminent threat of interference with a fair trial,"[1] and (b) there are no possible alternatives, such as a change of venue or close questioning of jurors. In other words, the standards applied in *Nebraska Press Ass'n v. Stuart, supra,* should be applied here – and for the same reasons.

This brief will be limited to these issues.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public to know

[1] Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

about the operation of all forms of government, through its press.

The interest of the Reporters Committee in the constitutionality of orders restricting public information about the courts is well known to this Court, as it has appeared before this Court in virtually every recent case challenging restrictions on the collection and publication of information about court proceedings, including:

* *Dickinson v. United States*, 414 U.S. 979 (1973), *cert. denied;*
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974), stay granted;
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 420 U.S. 985 (1975), dismissed as moot;
* *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975), stay denied;
* *Nebraska Press Ass'n. v. Stuart, supra;*
* *Central South Carolina Chapter, Society of Professional Journalists v. Martin*, 46 U.S.L.W. 3437 (U.S. January 9, 1978); *cert. denied*, and
* *Gannett Co., Inc. v. DePasquale* (in support of the Petition for a Writ of Certiorari), 46 U.S.L.W. 3679 (U.S. May 1, 1978), *cert. granted.*

The Committee is primarily supported by press donations and relies heavily on volunteer efforts to conduct its activities – such as this brief which is a *pro bono publico* effort by Attorneys for Amici aided by law student interns Lee Helfrich (American University Law School), Steven Helle (University of Iowa College of Law) and

Shelley Steuer (University of California at Los Angeles Law School).

The National Association of Broadcasters represents more than 5000 commercial broadcasting outlets in the United States. The Association has long been active in protecting the First Amendment and public information interests of the broadcast press. It enters amicus curiae in this case because it believes that the decision of the New York Court of Appeals, if not reversed, will substantially undermine the rights of the public and the press to monitor the judicial process.

The Reporters Committee for Freedom of the Press and the National Association of Broadcasters submit this brief *amici curiae* in support of the Petitioner Gannett Company, Inc., with the consents of the Petitioner and Respondents (see Appendix A).

QUESTION PRESENTED

May the public and the press, consistent with the First and Sixth Amendments to the United States Constitution, be ejected from traditionally public pretrial hearings whenever a trial judge – without any supporting evidence – believes that publication of truthful statements concerning the hearing may threaten the right of a defendant to an impartial jury and

a. when the history of the Sixth Amendment clearly shows that the Framers of the Constitution and the post-Constitutional courts believed that the public had an absolute right to attend all pretrial hearings; and

b. when the contemporaneous impact of pretrial secrecy would be to forego effective public scrutiny of the conduct of prosecutors, judges and police officers in nine out of every ten criminal cases in the state trial systems?

STATEMENT OF THE CASE

The Amici synopsize the statement of facts as follows:

Wayne Clapp, a former Brighton, New York, town policeman, was reported missing in July 1976. The week after his disappearance, Michigan police arrested three young people in the missing policeman's truck – a 16-year-old Texas youth, Kyle Greathouse, his 21-year-old companion, David Jones, and a young woman.

News reports said that Greathouse had led Michigan authorities to the location where he had buried a stolen revolver and that both Greathouse and Jones had made confessions before waiving their extradition to New York. The two were indicted by a Seneca County grand jury on charges

of murder and robbery; they pleaded innocent. (The young woman was not prosecuted.)

A pretrial hearing was begun before Respondent Judge Daniel A. DePasquale. Pursuant to a motion by the defense attorney, the hearing on the question of whether the alleged confessions should be admitted into evidence in the upcoming trial was held in secret, on the ground that certain evidence might be revealed which could be "prejudicial" to the defendants' rights to obtain an impartial jury. (Brief of Petitioner at 4.)

Petitioner, the Gannett Company, the owner of a number of newspapers, opposed the secret hearing, claiming it violated First Amendment rights to cover judicial proceedings. Because the hearing was over, Petitioner requested a copy of the transcript. The trial judge refused to provide the transcript, finding "a reasonable probability of prejudice" if information from the confession hearing was published.

On appeal, the Appellate Division ruled in Petitioner's favor, finding that a secret hearing was nothing more than a substitute for a prior restraint on the publication of news and that the judge had not provided the necessary compelling reason for censorship.

This decision was appealed to the State's highest court, the New York Court of Appeals, which reversed the Appellate Division and upheld the secrecy order. The Court of Appeals said that "criminal trials are presumptively open to the public, including the press,"[2] but that this was a pretrial proceeding, not a trial, and, therefore, the judge had more discretion to seal the hearing.

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[2] Gannett Co., Inc. v. DePasquale, 401 N.Y.S.2d 756, 759, 42 N.Y.2d 370 (C.A. 1977).

Because the evidence presented in the hearing might be suppressed, the court found that "to allow the disclosure of potentially tainted evidence is to involve the court itself in the illegality" and, therefore, it must be deemed to have the power to avoid becoming "a link in the chain of prejudicial" news.[3]

Thus, the Court of Appeals articulated the following general rule: "At the point where press commentary on those [pretrial] hearings would threaten the impaneling of a constitutionally impartial jury, pretrial evidentiary hearings in this state are presumptively to be closed to the public."[4]

The Court of Appeals further held that trial courts should "afford interested members of the news media an opportunity to be heard * * * to determine the magnitude of any genuine public interest" in the proceedings.[5] If the public interest is "overwhelming," such as in a trial involving "public officials," then the trial judge might wish to keep the proceedings open. The Court of Appeals concluded that public and press interest in the murder case was not based on a "legitimate" interest but was based on "mere curiosity * * * with respect to a notorious local happening."[6]

Judge Lawrence H. Cooke was joined in dissent by Judge Jacob D. Fuchsberg. Recognizing that closed hearings may sometimes be permissible, they nevertheless concluded that

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[3] *Id.* at 762.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 763.

"in this instance invocation of this drastic remedy without notice, without hearing, and without substantiation of a clear and present state necessity, abridged the rights of the press to report true accounts of public proceedings and deprived the public of a free flow of information in which they have a great interest. In the absence of compelling necessity, public scrutiny of the administration of justice and the effectiveness of law enforcement agencies cannot be foreclosed."[7]

Judge Cooke wrote that "the right of free expression must encompass both the freedom to convey information about a public matter and the liberty to gain access to proceedings involving the same" information. "A closed proceeding should be recognized for what it is," he said, "a serious backdoor threat to First Amendment interests."[8] The majority opinion, he believed "lock[s] the courtroom door virtually whenever requested in pretrial hearings."[9]

In March the Gannett Company asked this Court for review by Petition for A Writ of Certiorari. On May 1, 1978, this Court issued the writ. (46 U.S.L.W. 3679 (U.S. May 1, 1978).)

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[7] *Id.*

[8] *Id.* at 765.

[9] *Id.* at 766.

ARGUMENT

I

THE HISTORY, CONTEMPORARY PRACTICE AND COMMON UNDERSTANDING OF THE PUBLIC TRIAL GUARANTEE ESTABLISH THAT THE SIXTH AMENDMENT VESTED IN THE PUBLIC AND THE PRESS AN ALMOST ABSOLUTE RIGHT TO BE PRESENT DURING ALL STAGES OF A CRIMINAL PROCEEDING.

All available historical evidence demonstrates that the Sixth Amendment was intended to vest in the public and the press a right to attend all post-indictment proceedings, even when there is strong evidence that publicity about the proceeding would make it difficult to select an impartial jury. Since words of the Constitution should be interpreted with due regard to the intent of the Framers,[10] Amici believe that the following history of the open trial guarantee will be helpful to the Court.

Closed post-indictment proceedings are inconsistent with the history, philosophy, practice and intent of the public trial guarantee. This conclusion is demonstrated by the history of the public trial guarantee as evidenced by (1) its historical evolution in the colonies and its inclusion in the Constitution; (2) the absence of even a single instance of closed pretrial proceedings in an exhaustive survey of cases in the Commonwealth of Massachusetts from 1760 to 1830; and (3) the express application of the guarantee in a pretrial hearing in the most celebrated criminal trial of the period – the trial of Aaron Burr.

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[10] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 151-153 (1968); In Re Oliver, 333 U.S. 257, 266-271 (1948).

A. The Public Trial Provision Evolved from Well-Established Common Law.

The public trial provision of the United States Constitution has generally been viewed as an outgrowth of the common-law practice that "the trial is always public."[11] A succinct explication of the early philosophy of the provision is offered by one author who examined the common law system of England – the common law system adopted by the colonies:

> [Evidence is given] in the open court, and in the presence of the parties, their attornies, counsel, *and all by-standers*, and before the judge and jury: exceptions [made to competency of evidence or witnesses] are PUBLICLY stated, and by the judges openly and publicly disallowed; – wherein if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers.[12]

The right of the public to attend all judicial proceedings was viewed by American colonists as an essential guarantee, as evidenced by the fact that public trial provisions were contained in several states' charters. For example, the "Concessions and Agreements of West New Jersey" contained the following language:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely

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[11] 3 J. Story, Commentaries on the Constitution of the United States 662 (unabr. rep. 1970) (1st ed. Boston 1883).

[12] M. Hale, The History of the Common Law of England 343-344 (Runnington 6th ed. London 1820) (capitalization in original; emphasis supplied).

> come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner or in any covert manner* ***.[13]

This West New Jersey provision has been viewed as "an important step in the development which culminated in the federal Bill of Rights"[14] and, thus, illuminates the intention of the Sixth Amendment's drafters. Indeed, the Charter provision was described by its own writers as forming "a foundation for after ages to understand their liberty" and representing "the common law of fundamental rights and privileges * * * agreed upon * * * to be the foundation of the government."[15]

The Pennsylvania Frame of Government, drafted in 1682 by William Penn, as well as the latter Pennsylvania Declaration of Rights, provided that "all courts shall be open."[16] Similarly, the Declaration of Rights drafted by Massachusetts and Vermont contained provisions for public court proceedings.[17]

Moreover, none of the charters of the original states mentioned the exclusion of the public from any stage of any judicial proceeding.

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13 Concessions and Agreements of West New Jersey, 1677, *quoted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 125 (1971).

14 1 B. Schwartz, *supra* note 13 at 125.

15 *Id.*

16 Pennsylvania Declaration of Rights, 1776, *quoted in* 1 B. Schwartz, *supra* note 13 at 271.

17 1 B. Schwartz, *supra* note 13 at 323, 372.

In light of the English common law, the charters of New Jersey, Pennsylvania, Massachusetts and Vermont, and the absence of any suggestion to the contrary in basic governing instruments, it must be concluded that the colonists intended to secure for themselves and the generations that would follow a nearly undeniable – if not absolute – right to attend any and all stages of judicial proceedings.

There is no evidence to suggest that the drafters of the Sixth Amendment intended to secure for the people any less extensive a right than that conceived by the drafters of the state charters or accorded by common law. Madison's first proposals to the Congressional Convention contained a public trial provision.[18] That right subsequently became part of the Sixth Amendment in 1791, and most of the original states, as well as those later admitted to the Union, adopted similar provisions in their respective constitutions.[19]

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18 Note, The Rights to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138, 1138 (1966).

19 The Constitution of The United States – Analysis and Interpretation, U.S. Government Printing Office 1199-1200 (1973).

B. The Courts of the Commonwealth of Massachusetts, a strong Common Law Colony and then State, Never Conducted a Judicial Proceeding which Excluded any Member of the Public or the Press Prior to or Immediately After the Adoption of the Sixth Amendment.

An examination of all trials that took place in the Commonwealth of Massachusetts immediately preceding and subsequent to the adoption of the Sixth Amendment provides further evidence that the Founders of our nation intended that the public and the press have a vested right to attend all stages of judicial proceedings.

In what Amici believe is the only exhaustive survey of its kind, a noted legal scholar from the Yale Law School read, with narrow exceptions, every trial that took place in the Commonwealth between 1760 and 1830. In an affidavit (Appendix B), Professor William E. Nelson, author of "The Americanization of the Common Law," states the following:

> During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.
>
> In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.
>
> Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

It certainly must be assumed that sometime between 1791, when the Sixth Amendment was adopted, and 1830, the last year surveyed by Mr. Nelson, there were several cases in the Commonwealth of Massachusetts which generated substantial prejudicial information and political passions. Nonetheless, Mr. Nelson "found no indication" that the press or the public had been excluded from any stage of any judicial proceeding.[20]

These results of Professor Nelson's survey strongly suggest that both the pre- and post-Constitutional periods recognized an absolute right in the public and the press to attend all judicial proceedings.

C. The Aaron Burr Trial Is a Pretrial Case in Point

The most celebrated criminal trial in America's early history is persuasive evidence that the Sixth Amendment guaranteed access of the public and the press to all stages of criminal proceedings – even a proceeding in which the judge was aware that the publicity might deprive the defendant of an impartial jury.

Persons came to Richmond from near and far in 1807 to watch Colonel Aaron Burr's trial for treason, Chief Justice John Marshall presiding. Chief Justice Marshall permitted the proceedings against Burr to remain open to the

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20 Amici understand, of course, that the Sixth Amendment was not then applicable to the states. However, it is the contention of Amici that the common law reflected in state court proceedings is relevant in determining the intent of the Framers.

public and the press at every stage, even before an indictment was handed down by the grand jury. Indeed, one scholar noted that the proceedings were as much a battle to gain public sentiment as to gain a legal verdict.[21] The lawyers spoke to the spectators crowded into the courtroom far more than they did to the bench. And the throng inside the courtroom then repeated their words to the "thousands who could not get into the hall [to hear] what had been said by the advocates."[22]

It is doubtful whether in our post-Constitutional history there has ever been more public sentiment and prejudice stirred up by a single criminal proceeding as that against Burr – who was opposed by Jefferson at his highest peak of "popular idolatry."[23] Albert J. Beveridge, in his classic biography of John Marshall, observed that:

> so vocal and belligerent was the patriotic majority of people who were convinced of Burr's guilt that men who at first held opinion contrary to the prevailing sentiment, or who entertained serious doubt of Burr's guilt, kept discreetly silent. So aggressively hostile was public feeling that, weeks later, when the bearing and manners of Burr, and the devotion, skill, and boldness of his counsel had softened popular asperity, *Marshall declared that, even then, "it would be difficult or dangerous for a jury to venture to acquit Burr, however innocent they might think him"*[24] (emphasis supplied).

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21 A. Beveridge, The Life of John Marshall 421 (1919).

22 *Id.* at 420.

23 *Id.*

24 *Id.* at 401, quoting Blennerhassett Papers: Safford 465. *See id.* at 388-390.

Before the trial began, the chief prosecutor indulged in a tactic designed to prejudice public sentiment. He made a pretrial motion that Burr be kept in custody during the pendency of the trial, expecting Marshall to deny it and thus encourage the Republican press to further criticize Marshall's "leniency" to "traitors."[25] Marshall, however, allowed the prosecutor to present evidence on the motion at a public pretrial proceeding, while soundly criticizing his attempted maneuver to capitalize on the public nature of the proceedings. Marshall said:

> The court perceives and regrets that the result of this motion may be publications unfavorable to the justice, and to the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man, feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecutions, can view, without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artificially excited against the innocent, as well as the guilty.[26]

Marshall did not even hint that closing the pretrial proceeding to the public might be a viable alternative, although he was fully cognizant of the presence of the public and the press, and of their susceptibility to prejudice in a very high degree. But the proceeding – a pretrial proceeding – re-

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25 *Id.* at 423.

26 1 D. Robertson, Reports of the Trials of Colonel Aaron Burr (1808).

mained open. Chief Justice Marshall's adherence to the principle that the public must be permitted to attend even the most prejudicial type of pretrial proceeding was vindicated when the jurors – all of whom had admitted their prejudice against Burr[27] – returned a verdict of acquittal.

D. The Historic Erosion of the Public's Right To Attend Post-Indictment Proceedings Does Not Support the Action of the Court Below.

The favorable predisposition toward openness mandated by the Sixth Amendment continued through the mid-nineteenth century, for as Professor Lieber, whose philosophy has been described as representing the mainstream of nineteenth century thinking,[28] noted in his book, "On Civil Liberty and Self-Government," first published in 1853, "All governments hostile to liberty are hostile to publicitiy * * *."[29]

Beginning around 1880, however, the judiciary began limiting the scope of the public trial guarantee. The Kansas Supreme Court upheld a lower court's order excluding ladies from the audience while obscene testimony was taken.[30] A Texas Court of Appeals approved the exclusion of an audience that had engaged in laughing at a witness's testimony during the course of a rape trial.[31] In one curious case the California Supreme Court validated an order excluding all members of the public except those connected with the case, on the presumption that the appellant had assented,[32] although the court's reasoning was later characterized by the same court as unsound.[33]

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27 3 A. Beveridge, *supra* note 21 at 483.

28 F. Heller, The Sixth Amendment 142 (1951).

29 1 F. Lieber, On Civil Liberty and Self-Government 134 (3d ed. rev. Philadelphia 1874) (1st ed. 1853).

30 State v. McCool, 34 Kan. 617, 9 P. 746 (1886).

31 Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (1886).

Thus, with the advent of large metropolitan areas and the establishment of permanent courts, pretrial proceedings probably became a preferred method for efficiently settling evidentiary and other matters ahead of trial so that the trial itself would not be unduly prolonged. This technique, apparently adopted jointly by the bench and the bar in the name of efficiency, led to the beginning of *in camera* hearings and pretrial proceedings from which the public was excluded.

But curiously, while there were challenges to such exclusions, the challenges never came from members of the public or the press, so that this Court in this case will have its first opportunity squarely to review the question of the press and the public right to attend pretrial proceedings.

Once begun, the trend referred to above toward destroying the open court provision was joined by other courts which found that the right was the defendant's to waive at will,[34] or that there was no reversible error unless prejudice of some form was demonstrated.[35] Some courts upheld exclusion

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32 People v. Swafford, 65 Cal. 223, 3 P. 809 (1884).

33 People v. Hartman, 103 Cal. 242, 37 P. 153 (1894).

34 *See* Benedict v. People, 23 Colo. 126, 46 P. 637 (1896); Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950); People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (1900) (exclusion of general public upheld when defendant could designate friends he wanted to remain).

35 *See* Reagan v. United States, 202 F. 488 (9th Cir. 1913); Clemons v. State, 17 Ala. App. 533, 86 So. 177 (1920). As a practical matter, however, the public trial right would be negated if a

orders without reaching the merits by finding that the defendant failed to object in a timely manner or failed to request that any particular members of the audience be exempted from an exclusion order.[36]

Many courts, however, have maintained a broad view of the public trial guarantee. For example, in *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897),[37] the Michigan Supreme Court ruled unconstitutional a statute that had authorized lower court judges to exclude from courtrooms all parties except members of the press and friends of defendants.

Other courts, adopting the reasoning of *Yeager*, understood that the benefits of the public trial provision inure not only to the defendant[38] but to the public and the judiciary.

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showing of prejudice were required, since it is almost impossible to point to any specific injury due to the absence of an audience. United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). It is also questionable whether the state should oblige the defendant to carry the burden of demonstrating the harm of the state's misconduct. Note, *supra* note 18 at 1149.

36 *See* Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).

37 *Accord*, United States v. Kobli, *supra* note 35; Davis v. United States, 247 F. 394 (8th Cir. 1917) (per curiam); State v. Wade, 207 Ala. 1, 92 So. 101 (1921); People v. Hartman, 103 Cal. 242, 37 P. 153 (1894); Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918); State v. Hensley, 75 Ohio St. 255, 264, 79 N.E. 462, 464 (1906); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

38 Indeed, there is some question as to whether the public trial provision was initially envisioned as a protection for the defendant. M. Radin, The Right to a Public Trial, 6 Temple L.Q. 381, 383-384 (1932).

Among the bases for decisions supporting complete openness of all trial procedures are that it (1) checks judicial abuse and arbitrariness;[39] (2) discourages false testimony;[40] (3) provides notice of proceedings to witnesses who may have additional information;[41] (4) aids in appraisal of the judicial process;[42] and (5) educates the public and induces greater respect for the judicial process.[43] Decisions like these, grounded on considerations of public policy, establish clearly that the right of the public to attend all stages of a post-indictment proceeding is to be protected, not only as a right of the accused but as a right of the public itself.

Cases that have implemented a broad public policy perspective in interpreting the public trial right have exhibited a more thorough analysis of the purposes contemplated by that right. Typically, courts advocating a narrow view summarily conclude that the exclusion in a given case was within the judge's discretion – a conclusion that could just as easily have been reached in the absence of a Constitutional mandate that trials are to be public. Moreover, many de-

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39 In Re Oliver, 333 U.S. 257, 270 (1948); United States v. Kobli, *supra*, note 35 at 921; People v. Jelke, 308 N.Y. 56, 62, 123 N.E.2d 769, 771-772, 48 A.L.R.2d 1425, 1430 (1954).

40 State v. Schmit, *supra* note 37 at 806-807; People v. Jelke, *supra* note 39, 308 N.Y. at 52, 123 N.E.2d at 772.

41 United States v. Kobli, *supra* note 35 at 921; Tanksley v. United States, *supra* note 35 at 59; State v. Schmit, *supra* note 37 at 807; People v. Jelke, *supra* note 39, 308 N.Y. at 63, 123 N.E.2d at 772.

42 State v. Hensley, *supra* note 37, 75 Ohio St. at 266, 79 N.E. at 463-464; Neal v. State, *supra* note 37, 86 Okla. Crim. at 289, 192 P.2d at 297 (1948).

43 Note, *supra*, note 18 at 1139.

cisions on the merits which upheld the exclusion of members of the public and the press were based on nineteenth century notions of gentility and taste, or on the clearest type of present dangers to court proceedings, such as brawls and disorders in the courtroom. Until very recently, courts have not presumed to challenge Chief Justice Marshall's understanding that even the most highly prejudicial information is an inadequate justification for secret proceedings.[44]

E. Conclusion

For the foregoing reasons, Amici assert that this is not a case of the press seeking to obtain access to information

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[44] *Cf.* Estes v. Texas, 381 U.S. 532 (1965) (implied prejudice to accused warrants exclusion of television cameras); Oliver v. Postel, 30 N.Y.2d 407, 282 N.E.2d 306 (C.A. 1972) (overturning lower court's exclusion order aimed specifically at the news media). As late as 1932, one commentator noted that there was a consensus among the courts on the following limitations on exclusion:

(1) The court need not admit the public beyond the limits of the courtroom's normal capacity. It need not permit the aisles to be crowded or the corridors to be filled so as to prevent orderly ingress and egress.

(2) The court may order the removal of individual spectators whose conduct renders them dangerous or an obstruction to the trial.

(3) The court may exclude most of the public or certain classes of the public, if the testimony is likely to be obscene or offensive.

M. Radin, *supra* note 38 at 390. He added that it was established that courts could not exclude the press, except for personal misconduct. *Id.* at 391.

"[N]o court has gone so far as affirmatively to exclude the press." In re Oliver, 333 U.S. 257, 272 n.29 (1948).

which it has no right to obtain by using the First and Sixth Amendments as "a Freedom of Information Act."[45]

Rather, the opinion of the New York Court of Appeals voids a long-established, well-recognized and vested right in the public and the press under the First and Sixth Amendments to attend and report on all formal court proceedings – a right that should be not eroded by this Court except upon a clear and convincing showing of a serious and imminent threat to the administration of justice in each case in which a secrecy motion is made.

Even if changed circumstances in the news media and in society in general were to convince this Court to be more solicitous of the defendant than Chief Justice Marshall was in the Burr trial, this concern should not be used to destroy the ancient right of the public to demand accountability of the judiciary without clear evidence, in each case, that secrecy is the only alternative available. This Court should not deviate from the line of cases favoring extended public access to information about court proceedings[46] without such a showing.

Amici contend that no such evidence has been presented in the instant case.

It is one thing to hold, as this Court has, that judges are absolutely immune from suit for judicial acts, even when such acts are erroneous, malicious, or in excess of their au-

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[45] Houchins v. KQED, Inc., 46 U.S.L.W. 4830, 4833 (U.S. June 26, 1978).

[46] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941).

thority. *Stump v. Sparkman,* 46 U.S.L.W. 4253 (U.S. March 28, 1978). It is quite another to grant judges the broad authority exercised in this case to perform their judicial acts outside the scrutiny of the public, represented in most cases by the press. The combination of two such rulings would not only invite judicial abuse but cause grave misgivings in the public mind as to how the judicial branch of its government is actually carrying out its duties.

II

CLOSED POST-INDICTMENT PROCEEDINGS INVITE ABUSE BY JUDGES, PROSECUTORS, DEFENSE COUNSEL AND LAW ENFORCEMENT PERSONNEL

A. Trial Judges and Counsel Are Vulnerable to Political Pressure and Thus Require Public Scrutiny.

Politics influences the local and state judiciary to a considerable extent. All of the states and the District of Columbia are committed to some element of electoral review in the selection or retention of judges. Partisan election of judges takes place in fifteen states.[47] In eighteen states trial judges are elected on a non-partisan basis.[48] Ten states favor indirect review by either legislative or gubernatorial appointment.[49] The remaining states use merit selection plans in which an elected government official plays a key role in selecting a judge from a list prepared by an appointed commission.[50] While these selection systems attempt to eliminate

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47 American Judicature Society, Judicial Selection and Retention in the United States: A State-by-State Compilation (rev'd 1978).

48 *Id.*

49 *Id.*

50 *Id.*

partisan politics from the selection process, in fact, politics may directly affect appointments because of its effect on the official with the power to appoint.[51] As a result, public scrutiny of the official acts of the state judiciary is vital to its integrity.

The federal judiciary, too, is affected by partisan politics. In the appointment of federal judges, presidential politics, senatorial courtesy and the patronage system are well-known and documented factors. For the federal judiciary, appointed for life, public scrutiny may be the only effective restraint on potential abuse.

It is well recognized that political motivation can affect the impartiality of judges; this Court implied as much in *Sheppard v. Maxwell,* 384 U.S. 333, 342 (1966):

> The case came on trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge * * * was a candidate to succeed himself.

Moreover, in his book concerning New York City judges, Jack Newfield has documented the role of politics in judicial policymaking.[52] His research shows that politics and political parties play a role in "fixing" cases, motions and appeals.[53] Similarly, this Court has noted the political influences of segregationist politics on trial judges in the South.[54]

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51 Thode, Reporter's Notes to Code of Judicial Conduct 96 (1973).

52 J. Newfield, Cruel and Unusual Justice 81-190 (1974).

53 *Id.* at 127.

54 Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935).

A more recent example of the problems of political corruption in the judiciary is illustrated by the recent indictment of Judge Samuel DeFalco, Surrogate for New York County.[55] The 500-page indictment (which curiously has remained sealed) details an alleged net of corruption, based on political friendships, in connection with the disposition of trusts and estates in New York County.[56]

Amici do not want to be understood as making a blanket indictment of any judicial system, state or federal. We fully recognize that cases of judicial misbehavior are rare indeed. But the point is that so long as there is both the opportunity for improprieties and occasional demonstrations that they do occur, the public must at least have the assurance that it is being kept informed.

Political influence and pressure can also affect another crucial participant in the judicial process – the prosecutor. Prosecutors face the same re-election concerns as other politicians and may even run on the same political ticket as the local trial judge. Since most candidates for new judgeships are former prosecutors,[57] they can be expected to seek the approval of the partisan political establishment to obtain appointment or election to the bench. To ensure such political support, a prosecutor often seeks a high conviction record. Thus, for political reasons, a prosecutor will ordinarily select for trial those cases with a high chance of success[58] and may try to dispose of, or even cover up, cases

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55 People v. DeFalco, Indict. No. 462-78 (New York County Supreme Ct., Feb. 14, 1978).

56 *Id.*

57 President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 148 (1967).

58 McIntyre and Lippman, *Prosecutors and Early Dispositions of Felony Cases*, 36 A.B.A.J. 1154 (1970).

where the probability of conviction is low or the risk of political liability is high.[59]

The principle of public accountability does not stop with participants who are subject directly or indirectly to electoral review. The competency of lawyers themselves has been the subject of a recent controversy sparked, in part, by remarks by the Chief Justice of the United States, in which he suggested that a large number of lawyers who try cases are inadequately trained.[60]

Lawyers, as public officers of the court, play an important role in the administration of justice – particularly lawyers in public defender offices. Politics can affect public defender offices[61] because they are dependent upon public funding by elected officials. Thus, there is always the possibility that the political pressure of the purse could affect a public defender's decisions.

The public has the right to expect that criminal proceedings will be conducted with equality and fairness and that court personnel will perform properly.[62] It is imperative

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59 This Court should take judicial notice of the controversy surrounding the Justice Department during Watergate, and the allegations that the Attorney General and some of his subordinates were less than diligent in their efforts to uncover the identities of the ultimate culprits.

60 Remarks of Chief Justice Burger before American Bar Association, August 9, 1978.

61 Friloux, *Equal Justice Under Law: A Myth Not a Reality*, 12 Am. Crim. L. Rev. 691, 692 (1975).

62 Yankelovich, Skelly and White, Inc., The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders 27 (1978) (prepared for the National Center for State Courts) [hereinafter cited as Yankelovich]. Amici have lodged copies of this survey with the Clerk of the Court.

that all participants in the administration of justice be accountable to the public. Because the judicial process is so intermingled with the political process, Amici believe that to provide the requisite accountability, judges, prosecutors and others involved in the judicial system must be subjected to the broadest public scrutiny.

B. The Public Needs News Reports of Pretrial Proceedings To Exercise Effectively its Franchise in the Election of Judges and its Overview of Appointed Judges.

To participate effectively in the political process, the public needs information concerning governmental officials. This Court has recognized "that a major purpose of [the First] Amendment was to protect free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Judges, especially elected judges, should not be immune from effective public scrutiny. As this Court noted in *Cox Broadcasting, Inc. v. Cohn*, 420 U.S. 469, 495 (1975), "the citizenry is final judge of the proper conduct of public business." More recently, this Court recognized that public exposure of alleged judicial misconduct lies "near the core of the First Amendment." *Landmark Communications, Inc. v. Virginia*, 56 L. Ed. 2d 1, 10 (1978). In *Landmark*, Mr. Chief Justice Burger noted for the Court the importance of public access to information concerning the courts, stating, "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."[63]

However, because of the nature and operations of the judiciary, the public is frequently deprived of complete and

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63 Landmark Communications, Inc. v. Virginia, 56 L.Ed.2d 1, 10.

adequate information concerning the administration of justice.[64] Authorizing judges to close pretrial hearings will decrease the flow of already inadequate information and thereby destroy the public's ability to make effective judicial choices.

One reason for the lack of public information and understanding is the low visibility of the judiciary.[65] Seventy-four percent of the public has little or no familiarity with state courts.[66] Sixty-three percent has little or no familiarity with local courts, and seventy-seven percent has little or no familiarity with federal courts.[67]

Information about the judiciary is desperately needed by the public, as was demonstrated by a recent poll sponsored by the Ford Foundation and discussed on June 7-9, 1978 at a conference in Williamsburg, Virginia, sponsored by the National Center for State Courts. Inadequate information leads to widespread misunderstanding about the judicial process. For example, thirty-seven percent of the public believes that a person accused of a crime must prove his or her innocence.[68] Moreover, lack of adequate information may contribute to public apathy and skepticism about the administration of justice. One out of four people believes that court decisions are primarily affected by political considerations.[69] Of per-

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64 *Cf.* Yankelovich *passim;* Adamany and Dubois, *Electing State Judges*, 1976 Wisc. L. Rev. 731, *passim.*

65 Adamany and Dubois, *supra* note 64 at 771.

66 Yankelovich at 3.

67 *Id.*

68 *Id.* at 1.

69 *Id.* at 35.

sons familiar with the courts, forty-eight percent perceive a great or moderate need for reform.[70] Eighty-eight percent of the people with court experience and eighty-three percent of the people with no court experience believe that efficiency in the courts is a serious problem.[71] Only nineteen percent of the people with court experience and twenty-six percent of those with no court experience are extremely or very confident about the courts.[72] Amici believe that much of this skepticism is due to the low visibility of the judiciary. Closing post-indictment proceedings can only decrease visibility still further and tend to increase public skepticism about our court system.

A significant result of the low visibility of the judiciary is that the public lacks the knowledge to exercise intelligently its voting franchise. Judicial elections are characterized by low levels of information and participation. For example, only one percent of the voters in New York City, Buffalo, and rural Cayuga County could recall the name of the chief judge whom they had reelected.[73] A consumers' organization in New York reported that ninety percent of the people leaving the polls could give no explanation for their vote for a candidate for the bench other than party label, and most had difficulty remembering the name of the candidate for whom they voted.[74] One New York City judge was reelected without opposition soon after he had been indicted on two counts of perjury before a grand jury,

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70 *Id.* at 18.

71 *Id.* at 17.

72 *Id.*

73 Adamany and Dubois, *supra* note 64 at 775.

74 J. Newfield, *supra* note 52 at 152.

in connection with allegations that he had fixed criminal cases.[75]

Closed proceedings and censored press reports can only increase this public ignorance about the judiciary. As Wigmore has noted:

> The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy. [6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438-439 (Chadbourn rev. 1976).]

Moreover, judges who wish to prevent proper criticism of their conduct are more likely to close post-indictment proceedings.[76] "Those who would order proceedings closed would be among those whose performance of official duties would be cloaked by the closing."[77] It has been noted that exposure of a judge's actions "may reveal much about his fitness to fill his office even though his acts do not prejudice the defendant in any way."[78]

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75 Rinaldi v. Holt, Rinehart and Winston, Inc., 42 N.Y.2d 369, 371 (C.A. 1977).

76 Rifkind, *When the Press Collides With Justice*, in Selected Essays on Constitutional Law 651, 653 (Ass'n of American Law Schools ed. 1963).

77 Fenner and Koley, *The Rights of the Press and the Closed Criminal Proceeding*, 57 Neb. L. Rev. 442, 481 (1978).

78 United States v. Cianfrani, 573 F.2d 835, 853 (3d Cir. 1978).

Effective public accountability for judges is also hindered by the fact that judges have extraordinarily long terms of office. In New York, for example, a trial judge is elected for a fourteen year term.[79] Without periodic review, a judge is almost entirely immune from direct accountability. The power to remove from public scrutiny his disposition of ninety percent of his criminal docket can only have the effect of decreasing any feeling of accountability. "Exposure is the only control over the corrupt and the petty, the tyrannous and the weak, the unjust, incompetent and the incapacitated."[80]

In part because of the independence and insulation of the judiciary, the public depends almost entirely upon the press for its information concerning the judiciary. As stated by this Court in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 491-492:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of govern-*

79 State of New York, Twenty-Second Annual Report of the Judicial Conference and the Office of Court Administration 3 (1977).

80 Fenner and Koley, *supra* note 77 at 478.

> *ment generally.* With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. [Emphasis added.]

Even persons who have had courtroom experience depend on the press for information about the judiciary.[81] Seventy-one percent of the general public believes that the media should play a role in demonstrating the effectiveness of courts and seventy percent wants the media to show how the court system works.[82]

To deny the press the opportunity to report on post-indictment proceedings, therefore, is to deny the public the opportunity to receive information concerning its public servants. Without news reports the public will remain unfamiliar, skeptical, and confused about the court system. Voter turnout will remain low, and inefficient or corrupt judges will be more likely to stay in office. Only with first-hand news reports of pretrial proceedings – in which much of the judiciary's work is done – can the public prepare itself to participate meaningfully in the political and electoral process.

C. Open Preliminary Hearings Serve as a Crucial Safeguard Against Abuse of the Law Enforcement System.

The concept of open trials developed in order to ensure integrity, honesty, and equality in the administration of justice. Thus, in addition to ensuring meaningful public parti-

81 Yankelovich at 2.

82 *Id.* at 13.

cipation in selecting judges, open post-indictment proceedings help prevent the possibility of abuse of the judicial process. As this Court noted in *In re Oliver*, 333 U.S. 257, 270 (1948), "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power."

As the overseers of the public business, the public, and, therefore, the press, have a vested interest in the conduct of every stage of judicial proceedings. According to this Court, "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). To fulfill its role as a check against governmental abuse, the public has a need for and a right to immediate and adequate information on the performance of its public servants.

Open proceedings are especially important as the means of facilitating public scrutiny during the course of all phases of the *criminal* process. The public and the press should be permitted to be present at hearings involving alleged crimes "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned * * * rather than permit[ting] such crucial steps in the criminal process to become associated with secrecy." *United States v. Clark*, 475 F.2d 240, 246-247 (2d Cir. 1973). Criminal proceedings, and in particular preliminary hearings, are crucial sources of information about law enforcement and its effectiveness.

As Mr. Justice Brennan noted in his concurring opinion in *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 605-606:

> [D]isclosure of the circumstances surrounding the obtaining of an involuntary confession or

> the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice. * * *

Law enforcement is a major concern of the American public. At present eighty-eight percent of the public views crime as a leading problem facing the United States.[83] The public looks to the judicial process as a key component in effective law enforcement.[84] Forty-three percent of the general public criticizes the courts for not reducing violent crime.[85] Because nearly nine out of ten criminal cases are completed prior to trial, it becomes imperative that the public have access to information concerning those pretrial processes. "Secrecy * * * can only breed ignorance and distrust of courts * * *." *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 587 (Brennan, J., concurring).

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83 *Id.* at 27.

84 President's Commission on Law Enforcement and Administration of Justice, *supra* note 57 at 128.

85 Yankelovich at ii.

As noted above, matters before the court in a post-indictment proceeding can be the crucial factors determining the outcome of a case. Among major issues normally decided in preliminary proceedings are the suppression of evidence based upon illegal searches, illegal seizures, or illegal entrapments; the suppression of involuntary confessions; the dismissal of indictments; the severance of defendants; the striking of defenses; the challenge to the voluntariness of pleas; the selection of juries; the determination of pretrial release conditions; and the appointment of counsel for indigents. Such proceedings shed light upon the capabilities and integrity of law enforcers. For example, a hearing on a motion to suppress a coerced confession may not only provide the public with information about the ineffectiveness of its public servants, but also explain why so many allegedly "guilty" persons go free. As Wigmore has recognized, trial participants working "'under the public gaze" are "more strongly moved to a strict conscienciousness in the performance of duty."[86]

Public exposure is necessary because "[j]udges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of judicial power, others might exercise it to prevent proper criticism of their own administrations."[87] Moreover, because it is extremely difficult to prove abuses of judicial discretion, judges have effective immunity from attacks in court with respect to most of their judicial acts. *Pierson v. Ray*, 386 U.S. 547 (1966). Thus, public scrutiny may serve as the only effective counterweight.

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86 6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438 (Chadbourn rev. 1976).

87 Rifkind, *supra* note 76 at 653.

A report by The New York State Commission on Judicial Conduct on abuses occurring during judicial proceedings indicates the importance of keeping all such proceedings open.[88] Such irregularities include the failure to render decisions on motions;[89] delays in dismissals;[90] questioning plaintiffs in a way that departs from the role of impartial judicial officers;[91] excoriating plaintiffs;[92] accusing attorneys of improper conduct;[93] rudeness and unwillingness to listen to those making proper applications;[94] interfering with the selection of juries;[95] exerting pressure on attorneys to settle by threats of retaliation;[96] prejudging the merits of cases;[97] refusing to honor attorneys' affidavits of actual engagement;[98] arbitrarily denying reasonable requests for adjournment;[99] negotiating with police officers for the with-

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88 New York State Commission on Judicial Conduct, Annual Report 96 (January 1978).

89 *Id.* at 96.

90 *Id.*

91 *Id.* at 104.

92 *Id.*

93 *Id.* at 105.

94 *Id.*

95 *Id.* at 103.

96 *Id.* at 105.

97 *Id.*

98 *Id.*

99 *Id.*

drawal of charges against friends;[100] sentencing defendants in a proceeding without having notified either the prosecuting attorney or defense counsel and even striking defendants.[101]

Similar abuses can occur because of prosecutorial abuse. Prosecutors have been granted the same common law immunity that judges enjoy.[102] Therefore, the only adequate check against abuses of their position is "the knowledge that their assertions will be contested * * * in open court." *Butz v. Economu*, 46 U.S.L.W. 4952, 4961 (U.S. June 29, 1978).

Exposure not only will protect against abuse by judges and prosecutors, but will guard against further abuse by those officials whose actions are called into question at pretrial hearings.[103] For example, pretrial proceedings frequently expose the maltreatment of prisoners by law enforcement officers during interrogations. Such abuses include physical brutality;[104] threats of physical brutality;[105] removal of prisoners from jail at night for questioning in secluded places;[106] keeping prisoners unclothed or standing

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100 *Id.*

101 *Id.*

102 Imbler v. Pachtman, 424 U.S. 409 (1976).

103 United States v. Clark, 475 F.2d 240, 246-247 (2d Cir. 1973).

104 Brown v. Mississippi, 297 U.S. 278 (1936).

105 Malinski v. New York, 324 U.S. 401 (1945).

106 White v. Texas, 310 U.S. 530 (1940); Vernon v. Alabama, 313 U.S. 547 (1941).

on their feet for long periods during questioning;[107] deprivations of sleep to sap a prisoner's strength;[108] disregard for the need for food;[109] threat of a lynch mob;[110] deception;[111] threats against a defendant's family;[112] misrepresentation of a co-defendant's confession in order to induce a confession;[113] protracted periods of questioning;[114] and holding a suspect incommunicado for days.[115]

Alleged abuse by police officers and other law enforcement officials during searches for evidence are often the subject of pretrial hearings. Examples of such abuses include the seizure of property without warrant when there was ample time to obtain one;[116] a three-hour warrantless search of a sixteen-room house and massive seizures;[117] an exhaustive search of a cabin and the seizure of its entire

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107 Lomax v. Texas, 313 U.S. 544 (1941).

108 Chambers v. Florida, 309 U.S. 227 (1940); Leyra v. Denno, 347 U.S. 556 (1954).

109 Payne v. Arkansas, 356 U.S. 560 (1958).

110 *Id.*

111 Spano v. New York, 360 U.S. 315 (1959).

112 Harris v. South Carolina, 338 U.S. 68 (1949).

113 Frazier v. Cupp, 394 U.S. 731 (1969).

114 Ashcraft v. Tennessee, 322 U.S. 143 (1944).

115 Davis v. North Carolina, 384 U.S. 737 (1966).

116 Trupiano v. United States, 334 U.S. 699 (1948).

117 Von Cleef v. New Jersey, 395 U.S. 814 (1969).

contents without a warrant;[118] a four-day warrantless search of entire premises and the seizure of 200-300 items;[119] a warrantless entry and seizure by IRS agents;[120] the misrepresentation of facts to establish probable cause in a warrant affidavit;[121] an illegal search without a warrant of a footlocker not in the immediate control of the owners;[122] a warrant issued by a law enforcement officer who was in charge of the investigation and the key prosecutor;[123] a warrantless search of an entire home at the time of arrest extending beyond the area under the defendant's immediate control;[124] an unreasonable. warrantless search and seizure of a union office when union officials had a reasonable expectation of the privacy of their records;[125] a warrant issued without sufficient information for a finding of probable cause;[126] governmental wiretapping and recording of a defendant's telephone conversation in violation of the Fourth Amendment;[127] and the failure to obtain a warrant from a neutral and detached magistrate.[128]

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118 Kremen v. United States, 353 U.S. 346 (1957).

119 Mincey v. Arizona, 46 U.S.L.W. 4737 (U.S. June 21, 1978).

120 G.M. Leasing Corp. v. United States, 429 U.S. 338 (1976).

121 Franks v. Delaware, 46 U.S.L.W. 4869 (U.S. June 26, 1978).

122 United States v. Chadwick, 433 U.S. 1 (1977).

123 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

124 Chimel v. California, 395 U.S. 752 (1969).

125 Mancusi v. DeForte, 392 U.S. 364 (1968).

126 Spinelli v. United States, 393 U.S. 410 (1969)

127 Katz v. United States, 389 U.S. 347 (1967).

128 Johnson v. United States, 333 U.S. 10 (1948).

Such abusive tactics have a dramatic effect upon law enforcement. A guilty person can be allowed back on the street because of illegal police practices. An innocent person can be deprived of his Constitutional rights. The public has a right to know about these abuses so that it may reform the system. A critical step in improving the conduct of law enforcement officials is to permit the press to report on post-indictment proceedings.

CONCLUSION

Amici began this brief with a review of the American concept of open courts dating back to the days before our Constitution was written when the colonies were still much affected by the British system, including both its protections and abuses. The Framers of the Sixth Amendment intended our courts to be open at all stages of their proceedings -- and in fact the courtrooms of this nation were probably *the single most important public forum* for the airing of local political and legal controversies during the period when America was primarily a rural nation.

With the emergence of large urban metropolitan areas, the local county courtroom *public forum* has been replaced by ever-growing and increasingly congested metropolitan court systems; and this demographic change has made it impossible for the average citizen to come to his court, as he did in the 18th and 19th centuries, to view the performances of justice in person.

This has meant, of course, that the citizen must rely more and more on the press to be his or her surrogate by monitoring courtroom proceedings. But the fundamental principle, envisioned by the Framers of the First and Sixth Amendments, should remain the same: our courts are *public forums*, and this Court should not suppress these

forums without strict procedural safeguards and overwhelming evidence of a clear and present danger to the administration of justice. *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Open courts provide safety and the assurance of justice for us all. Closed courts invite public mistrust and official malfeasance. We respectfully suggest that this is no time in our history to allow courts to avoid the strong strictures of *Nebraska Press Ass'n v. Stuart* by the simple device of closing their doors.

Respectfully submitted,

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SARA-ANN DETERMAN

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July 5, 1978

Jack C. Landau, Esq.
The Reporters Committee for
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Legal Defense and Research Fund
1750 Pennsylvania Avenue, N.W.
Room 1112
Washington, D.C. 20006

RE: Gannett Co. Inc. v. Hon. Daniel A. DePasquale, as Judge of the Seneca County Court, et. al.

Dear Mr. Landau:

In response to your request, on behalf of The Honorable Daniel A. DePasquale, Kyle Edwin Greathouse, David Ray Jones and Stuart O. Miller, District Attorney of Seneca County, we hereby consent to the filing in the United States Supreme Court of an Amicus Curiae Brief by the Reporters Committee for Freedom of the Press which will be filed with the Court no later than August 15, 1978.

Sincerely yours,

Bernard Kobroff
Staff Attorney

BK/jlw

cc: Robert Bernius Esq.
Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, NY 14603

APPENDIX A

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July 7, 1978

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Reporters Committee for
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Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Gannett Co., Inc. v. DePasquale, et al.

Dear Mr. Landau:

On behalf of Gannett Co., Inc. I hereby consent to an extension of the time for filing a brief amicus curiae by the Reporters Committee for Freedom of the Press up to and including August 15, 1978.

Very truly yours,

Robert C. Bernius

RCB:mtm

APPENDIX A

AFFIDAVIT

WILLIAM E. NELSON, being duly sworn, deposes and says,

1. I am an Associate Professor of Law at Yale Law School in New Haven, Connecticut.

2. I have authored a book entitled The Americanization of the Common Law.

3. During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.

4. In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.

5. Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

William E. Nelson
WILLIAM E. NELSON

Dated:

Sworn to before me this
7th day of July, 1978

Patricia T. Gunnoud
PATRICIA T. GUNNOUD
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1981

APPENDIX B